U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

May 14, 1997

The Honorable John W. Drummond
President Pro Tempore of the
South Carolina Senate
Attn: Mark Packman, Esq.
Dickstein, Shapiro, Morin, & Oshinsky
2101 L Street, N.W.
Washington, D.C. 20037-1526

Dear Mr. Drummond:

This refers to your request that the Attorney General reconsider and withdraw the April 1, 1997 objection interposed under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, to the 1997 redistricting plan for the South Carolina Senate. We received your request on April 14, 1997.

We have reconsidered our earlier determination in this matter based on the information and arguments you have advanced in support of your request, along with the other information in our files and comments received from other interested persons. The senate bases its request for reconsideration primarily on the arguments set out in the senate's Memorandum in Support of the Motion to Adopt the 1997 Proposed Plan as an Interim Plan, submitted to the court in Smith v. Beasley, 3-95-3235-0 (D.S.C.), on April 14, 1997. That Memorandum incorporates essentially three arguments: (1) the Attorney General utilized the wrong benchmark in her retrogression analysis; (2) neither the 1995 staff plan nor the ACLU's illustrative plan provides an appropriate remedy for the constitutional violation identified in Smith, and thus the Attorney General erred in using these plans as part of her analysis; and (3) it is impermissible for the Attorney General to base an objection on a clear violation of Section 2.

The April 1 objection letter explained the analysis used to evaluate possible retrogression under the 1997 senate redistricting plan. Ordinarily, a proposed redistricting plan is compared to the plan that was "in effect" at the time of the submission to determine whether the change has reduced minority voting strength in a significant way. Such a reduction is termed "retrogressive" and violates Section 5. See Beer v. United States, 425 U.S. 130, 141 (1976). In circumstances such as those presented here, where certain districts in the last plan "in effect" have been found to be the result of an unconstitutional racial gerrymander, our analysis goes a step further. We must look to determine whether the reduction in black voting strength effected by the proposed remedial plan was necessary to cure the constitutional infirmities found in the existing plan. If the diminution of black voters' electoral opportunities is necessary to satisfy the Constitution, that reduction does not violate the principles of Section 5 and would not be retrogressive. However, Section 5 prohibits the state from abridging minority voting strength more than is necessary to cure the unconstitutionality.

The senate argues that the benchmark should be the state's 1984 redistricting plan. However, to use a plan from the prior decade to gauge the degree to which black voters would be "worse off" under the 1997 plan than they are now would ignore the legitimate gains in electoral opportunity by minority voters reflected in plans implemented since that time, including the existing plan (most aspects of which suffer no constitutional defects). Such an approach would contravene the very purpose of Section 5 and would not be necessary to serve the goal of requiring states to tailor their remedial efforts to curing courts' findings of unconstitutionality. In contrast, the retrogression analysis employed by the Attorney General strikes the necessary balance between the state's obligations to follow the constitutional principles enunciated in Shaw v. Reno (and the subsequent Supreme Court rulings construing it) and the Voting Rights Act's mandate to ensure that minority voters do not suffer avoidable retrogression in their ability to participate in the political process and to elect their choices to office.

The proposed plan, as set out in Act No. R.2 (1997), would have resulted in a significant reduction in black voting strength in the two majority black senate districts that were altered. In your February 19, 1997 submission, you contended that these significant reductions were necessary to remedy the court's constitutional concerns. With regard to the reduction of black population levels in Senate District 29, the state satisfied its Section 5 burden. However, with regard to Senate District 37, we concluded that the state failed to sustain its burden of demonstrating that the 13 percentage point reduction in black

voting age population was necessary for the state to comply with the Smith court's order.

The state asserts that neither the ACLU illustrative plan nor the 1995 staff plan provides an appropriate remedy for the constitutional violation identified in Smith. As clearly stated in the April 1 objection letter, the reference to the ACLU's illustrative plan was not intended to suggest that the state must adopt that plan as a remedy. Rather, the illustrative plan served the analytical purpose of demonstrating one way to configure the districts to include a reasonably compact District 37 that appears to cure the constitutional infirmities identified by the Smith court while not effecting so significant a reduction in black voting strength in that district.

It may be true that aspects of the approach taken in this alternative plan may not satisfy all of the senate's political goals or other redistricting preferences and the state, of course, remains free to apply its legitimate criteria (e.g., the senate's stated concerns over the population deviations in the ACLU plan likely could be alleviated if it chooses not to keep as many VTD's whole). Nevertheless, the senate's criticisms of this illustrative plan do not undermine our conclusion that the senate has not carried its burden of showing that the reduction in black voting strength in District 37 was necessary to address the Smith court's order. As to the 1995 staff plan, we reiterate that it served the limited role of demonstrating that the effect of removing the City of Georgetown from District 37 (to comply with the court's order) could have been minimized by including compact black population areas in Williamsburg and Dorchester Counties in District 37.

The state also argues that the objection should be withdrawn because it is impermissible for the Attorney General to base an objection under Section 5 on a conclusion that the proposed plan represents a clear violation of Section 2. That legal question was recently resolved by the Supreme Court. In Reno v. Bossier Parish School Board, ___ U.S. ___, 1997 WL 235097 (May 12, 1997), the Court held that preclearance under Section 5 may not be denied solely on the basis that the jurisdiction's new voting "qualification, prerequisite, standard, practice, or procedure" violates Section 2 of the Voting Rights Act. In light of the Bossier Parish ruling, we no longer base the objection to the 1997 plan on the conclusion that the proposed plan constitutes a clear violation of Section 2.

In light of these considerations, I remain unable to conclude that the state has sustained its burden of proving that as to the proposed District 37 the plan does not result in "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise" that is not required to bring the senate districts in compliance with the Equal Protection Clause of the Fourteenth Amendment. See Beer v. United States, 425 U.S. at 141. Thus, the state has not demonstrated that the proposed plan neither has a discriminatory purpose nor a discriminatory effect. See Georgia v. United States, 411 U.S. 526 (1973); Procedures for the Administration of Section 5, 28 C.F.R. 51.52. Therefore, on behalf of the Attorney General, I must decline to withdraw the objection to the 1997 redistricting plan for the South Carolina Senate.

As we previously advised, you may seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. Until such a judgment is rendered by that court, the objection by the Attorney General remains in effect and the proposed change continues to be legally unenforceable. See Lopez v. Monterey Co., California, 117 S.Ct. 340 (1996); Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10, 51.11, and 51.48(c) and (d).

Since the Section 5 status of the 1997 redistricting plan for the South Carolina Senate is before the court in Smith v. Beasley, C.A. No. 95-3235:0 (D.S.C.), we are providing a copy of this letter to the court and counsel of record in that case. To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the state plans to take concerning this matter.

Sincerely,

Isabelle Katz Pinzler
Acting Assistant Attorney General
Civil Rights Division

cc: The Honorable Robert F. Chapman
The Honorable Matthew J. Perry
The Honorable Joseph Anderson, Jr.

Counsel of Record